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Supreme Court, U.S.
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CASE NO.

in the

Supreme Court

of the

United States

October Term, 1990

CARNIVAL CRUISE LINES, INC.,

Petitioner,

vs.

BALBINO JIMENEZ GARAY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER A NEW EXCEPTION SHOULD BE CREATED TO ALLOW SEAMEN INJURED AS A RESULT OF THEIR OWN INTOXICATION TO RECOVER MAINTENANCE AND CURE BASED ON AN EMPLOYER'S POLICY OF ALLOWING DRINKING ON A CRUISE SHIP.

II.

WHETHER AN APPELLATE COURT'S REVERSAL OF A SPECIFIC FACTUAL FINDING BY A JURY SUPPORTED BY COMPETENT EVIDENCE CONSTITUTES A VIOLATION OF THE SEVENTH AMENDMENT.

III.

WHETHER PUNITIVE DAMAGES ARE RECOVERABLE FOR ANY TYPE OF FAILURE BY A SEAMAN'S EMPLOYER TO PROVIDE THE SEAMAN WITH MAINTENANCE AND CURE.

PARTIES TO THE PROCEEDING

Carnival Cruise Lines, Inc. (Appellee), and Balbino Jimenez Garay, (Appellant) were parties before the United States Court of Appeals for the Eleventh Circuit. Carnival Cruise Lines, Inc. (Carnival) does not have any parent corporations. Carnival does have some subsidiaries or subsidiaries of subsidiaries which are not wholly owned by Carnival:

UUSI Telakkayhtio Oy

Masa-Yards Inc.

Carnival Crystal Palace Hotel Corporation Limited

Carnival Leisure Industries Limited

Carnival's Crystal Palace, U.S., Inc.

Experience The Bahamas Limited

Carnicon Lucaya Management Associates Limited

Carnicon Nevada Management Associates

Carnicon-Aruba Management Associates

Carnicon Management Associates

Carnicon St. Lucia Management Associates

Carnicon Development Company

Carnicon-Venezuela Hotel Consultants, L.C.

Carnicon Puerto La Cruz, C.A.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Carnival respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the 11th Circuit entered in this proceeding on July 10, 1990.

OPINIONS BELOW

The Final Opinion of the United States Court of Appeals for the 11th Circuit is reported at 904 F.2d 1527 (11th Cir. 1990) and appears in the Appendix. (App. 2).[1]

The decision of the United States District Court for the Southern District of Florida is reported at 716 F.Supp. 1421 (S.D. Fla. 1989) and is also contained in the Appendix. (App. 17). References to the Record shall be abbreviated by an R. followed by a volume and page number (R.__).

STATEMENT OF JURISDICTIONAL GROUNDS

This Petition of Writ of Certiorari to the United States Court of Appeals for the 11th Circuit arises from the Opinion filed by the 11th Circuit on July 10, 1990. (App. 2). The suggestion of En Banc consideration and petition for rehearing of Carnival Cruise Lines, Inc. was denied on September 6, 1990. (App. 24). The petition for rehearing and clarification of Garay was denied on September 6, 1990. (App. 24). This Petition for Certiorari is being filed within 90 days of that date.

The Petitioner invokes the discretionary jurisdiction of this Honorable Court pursuant to the provisions of 28 U.S.C. § 1254(1). Parts II and III of this petition rely on the 7th Amendment to U.S. Constitution which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

Balbino Jimenez Garay [Garay] was a seaman on a vessel

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[1] Citations to the Petition's Appendix shall be noted by App. followed by a page number. (App. ___).

operated by Carnival Cruise Lines, Inc. [Carnival]. Garay suffered head injuries when he fell down the stairs on board the ship. Garay sued Carnival on the basis of claims for maintenance and cure (including punitive damages), Jones Act negligence, unseaworthiness, and failure to treat. The trial court had jurisdiction of this case because it was an admiralty and maritime case. 28 U.S.C. § 1333(1).

Carnival defended the case asserting, among other things, that Garay was injured as a result of his own intoxication.

The jury specifically found that Garay was injured as a result of his own willful misbehavior. (R. 6-182) (R. 12-844) There were 5 witnesses that testified that Garay was intoxicated or under the influence of alcohol. Most of the facts concerning Garay's intoxication are set forth in the 11th Circuit's opinion. Carnival does wish to point out a few facts that were not contained in that opinion. Most importantly, the fact that Garay was absent from his work station as the result of alcohol consumption was grounds for termination (R. 10-555, 556).

Garay's expert conceded that there was no way a ship owner could prevent a seaman from drinking when the vessel was in port. (R9-400-410). Garay's expert further admitted that it was necessary to allow drinking for crew members on board passenger vessels. (R. 9-393). There was no evidence that Garay was ever served any alcoholic beverages on board the vessel on the day of the accident. In fact, the crew bar was closed during that period of time because the ship was in port. (R. 10-516, 517) (R. 10-594, 11-601, 4-112-87).

The jury found in favor of Carnival on the maintenance and cure claim, the punitive damages claim, the Jones Act claim and the unseaworthiness claim. The jury found in favor of Garay on the failure to treat claim but that award was set aside by the trial judge based on Carnival's motion for judgment notwithstanding the verdict. The trial court entered judgment in favor of Carnival.

Garay appealed to the Eleventh Circuit. The Eleventh Circuit reversed the judgment in favor of Carnival on the maintenance and cure claim. Despite the jury verdict, the Eleventh Circuit held that a directed verdict should have been granted against Carnival on its willful misbehavior (intoxication) defense. The Eleventh Circuit ordered the case remanded to the trial court for a determination of the amount of maintenance and cure due and whether punitive damages should be awarded.[2] Carnival now petitions this Court for review.

REASONS FOR GRANTING WRIT

I.

THE DECISION OF THE 11TH CIRCUIT CONFLICTS WITH THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS HOLDING THAT INTOXICATION CONSTITUTES MISCONDUCT BARRING A SEAMAN'S RECOVERY FOR MAINTENANCE AND CURE.

The 11th Circuit agreed that the jury could find that Garay was intoxicated at the time of his accident. However, the 11th Circuit held that such intoxication could not, as *a matter of law,* constitute a defense to this maintenance and cure claim because the ship had tacitly permitted drinking and even drunkenness on board the vessel.

The 11th Circuit opinion therefore conflicts with *Aguilar v. Standard Oil Co.,* 318 U.S. 724, 731,, 63 S.Ct. 930, 934, 87 L.Ed. 1107 (1943). In that case, the U.S. Supreme Court recognized the majority rule that intoxication was a traditional instance of willful misbehavior that would suffice to

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[2] Carnival interprets the 11th Circuit's opinion to limit the issues on remand to only the amount of maintenance and cure due, plus whether punitive damages should be awarded, and if so, how much. Carnival further interprets the opinion to affirm the judgment entered in favor of Carnival on the Jones Act negligence claim, the unseaworthiness claim and the failure to treat claim.

deprive the seaman of his maintenance and cure rights. No mention was made for any exception based on the strength or weakness of the shipowner's disciplinary policies.

In *Aguilar,* this court noted a minority rule that on occasion the intoxication defense has been "qualified in recognition of a classic predisposition of sailors ashore." However, the overwhelming majority rule in the United States is that intoxication does bar recovery for maintenance and cure:

> A seaman who becomes drunk as the result of indulgence in intoxicating drink and is sick or injured as a result of his intoxicated condition is not entitled to receive maintenance and cure from the shipowner or the vessel. Norris, *The Law of Seamen* § 26:67 (4th Ed. 1985).

The ruling of the 11th Circuit creates a conflict between the Circuits. For example, in *Barlow v. Pan-Atlantic S.S. Co.,* 101 F.2d 697, 698-699 (2d Cir. 1939) the Second Circuit stated that "[w]hen it is clear that a seaman's injuries occurred solely because of his intoxication, we think they are rightly held to be occasioned by his own misconduct and that the shipowner is under no duty to provide maintenance and cure." No exception was created for crew members of companies that did not harshly impose discipline every time a seaman had too much to drink. The *Barlow* decision has been followed by the trial courts in the 2nd Circuit. *Victoria v. Luckenbach Steamship Company, Inc.,* 141 F.Supp. 149 (S.D. N.Y. 1956).

The Seventh Circuit has stated that it is "uncontroverted that a well established rule in Admiralty holds a seaman is not entitled to maintenance for injuries resulting from his own intoxication." *Bloomquist v. T.J. McCarthy Steamship Company,* 263 F.2d 590, 593 (7th Cir. 1959). This rule has been a part of admiralty law from as far back as the 13th Century. *Rawding v. Hooten,* 88 F.2d 125, 128 (1st Cir. 1937).

In *Daily v. Alcoa Steamship Co.,* 337 F.2d 611, 612 (5th Cir. 1964) the 5th Circuit held that a seaman's intoxication

constituted misconduct barring recovery for maintenance and cure from the ship owner. Such a defense has long been enforced by the trial courts of the 5th Circuit. *See Matthews v. Gulf & South American Steamship Co.*, 226 F.Supp., 555, 556 (D. La. 1964), *aff'd on other grounds*, 339 F.2d 702 (5th Cir. 1964) ("willfull misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection...instances of such misbehavior are intoxication...").

The 11th Circuit tried mightily to distinguish *Dailey* in an attempt to avoid a conflict with that case. The 11th Circuit's opinion in the case at bar, however, directly conflicts with *Dailey's* holding. The distinctions pointed out by the 11th Circuit are distinctions without a difference.

At a minimum, the 11th Circuit creates an exception to the *Dailey* decision which would virtually swallow the rule. The panel held that intoxication would not be willful misconduct so as to create a defense to maintenance and cure if a ship had a tacit policy of permitting drinking or even drunkenness on board the vessel. No prior authority, however, had ever so ruled. The 11th Circuit's opinion therefore constitutes a change in the law.

The rule promulgated by the 11th Circuit is not practical. The 11th Circuit states that the ship owner may avoid maintenance and cure payment for a seaman's injuries caused by intoxication if the ship owner makes clear that intoxication is misconduct, is considered misbehavior by ship owner, and is treated as such.

The 11th Circuit asserted that Carnival did not do this because it rarely imposed discipline for drunkenness and because it operated a crew bar. Does this mean that any testimony that at any time the vessel operator did not discipline drunkenness renders all questions of fact moot?

The 11th Circuit opinion did not even require that the seaman show a casual link between the seaman's accident and the policies of the ship concerning alcohol consumption.

The alcohol consumed by Garay was obtained on shore. If there is to be a change in the law, the seaman should at least be required to show that the ship's policies were directly related to his accident.

Carnival (and the rest of the shipping industry) should not be punished because of a failure to fire every seaman who drank too much alcohol. Such a rule would be totally impractical and might result in a substantial reduction of persons willing to act as seamen.

The 11th Circuit opinion therefore conflicts with opinions from the 1st, 2nd, 5th and 7th Circuits as well as the *Aguilar* opinion of this Court. Carnival thus requests that this court review this matter to establish a uniformity of law on this point. There is a constitutionally based principle that federal admiralty law should operate uniformly in the whole country. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 402, 90 S.Ct. 1772, 1788,, 26 L.Ed. 2d 339 (1970).

II.

THE DECISION OF THE 11TH CIRCUIT VIOLATES CARNIVAL'S SEVENTH AMENDMENT RIGHTS AND CONFLICTS WITH THE CLEAR PRECEDENTS OF THIS COURT WHICH HOLD THAT AN APPELLATE COURT MAY NOT REVERSE A FACTUAL FINDING BY A JURY WHICH IS SUPPORTED BY COMPETENT EVIDENCE.

The 11th Circuit violated constitutional restrictions on its power by redetermining facts found by a jury. Under the Seventh Amendment to the Federal Constitution which provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law," neither the United States Supreme Court nor a United States Court of Appeals can redetermine facts found by a jury. *Atlantic & Gulf Stevedores,*

Inc. v. Ellerman Lines, Ltd., 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed. 2d 798 (1962), *rehearing denied*, 369 U.S. 882, 82 S.Ct. 1137, 8 L.Ed. 2d 284, (1962).

The Seventh Amendment forbids appellate judges to sit as post-trial assessors and denies them the power to vacate awards they might, as fact-triers, have decided differently. *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1174-1175 (5th Cir. 1981). This should be particularly true where the trial judge below found that there were sufficient facts to support the willful misbehavior defense. However, the 11th Circuit ignored the Seventh Amendment prohibitions. A review should be granted to maintain a consistency of the law on this point.

The jury made a special finding that Garay was injured as a result of his own willful misbehavior. (R. 6-182). (R. 12-844). A special finding by a jury must be presumed to be in accordance with the facts and must stand as a foundation for the judgment of the court. *The Phillips & Colby Construction Company v. Seymour*, 91 U.S. 646, 23 S.Ct. 341 (1876). Appellate courts are not free to substitute their judgment for that of the jury. *Lame v. United States Department of Justice*, 767 F.2d 66, 69 (3rd Cir. 1985).

There was sufficient competent evidence of willful misbehavior to allow this issue to be presented to the jury. In addition to the proof of intoxication, there was proof that Garay was absent from his workstation (and thus unable to perform his duties) at the time of the accident. *Garay*, 904 F.2d at 1532 n.5; (App. 12). The testimony of Staff Captain Casari made it clear that if a seaman drank so much that he didn't go to work, that would be reason for disciplinary action including firing. (R. 10-555, 556).

In fact, disciplinary action for use of alcohol had been taken on one of the witnesses in the case (Seaman Ochoa). Seaman Ochoa had been terminated from the ship's employ (with permission to return after three or four months) because

of a drinking problem affecting his work performance. (R. 10-587) (R. 10-594, 11-601, 4-112-4, 5, 91).

Furthermore, Staff Captain Casari testified that a seaman shouldn't drink so much that he was dangerous to himself. *Garay*, 904 F.2d at 1532; (App. 11). The jury obviously reached the conclusion that Garay had drunk so much that he was dangerous to himself.

Captain Casari stated that a person who is drunk and violent would get fired (R. 10-515) and that a person who got drunk but does not cause problems to himself or to other people would be given a warning (R. 10-515). There was nothing about Garay's activity before the accident that suggested that he should have been fired. (R. 10-515).

There was expert opinion testimony to show that the vessel Tropicale adequately monitored and controlled drinking by crew members in January of 1985. (R. 10-516). Such discipline required discretion which may vary from person to person and from circumstance to circumstance. (R. 10-515-516).

Garay's own expert conceded there is no way a ship owner could prevent seamen from drinking ashore when the vessel was in port. (R. 9-400, 401). Garay's expert stated further that it was necessary to allow drinking for crew members on board passenger vessels. (R. 9-393).

Although the 11th Circuit's opinion specifically mentioned that Carnival operated a crew bar, there was no evidence that Garay was ever served any alcoholic beverages on board the vessel on the day of the accident. In fact, the crew bar was closed during that period of time because the ship was in port. (R. 10-516, 517) (R. 514, 11601, 4-112-87). Other courts have rejected the contention that the defense of intoxication may not be asserted where liquor has been permitted on board a vessel. *Kontos v. S.S. Sophie C*, 236 F.Supp. 664, 672 (E.D. Pa. 1964).

Carnival asserts (1) that the conduct of the crew member's

employer is irrelevant and (2) that intoxication is a defense as a matter of law to a maintenance and cure claim. However, even if this position is too sweeping, at least Carnival was entitled to have the issue of what is willful misconduct determined by the jury. The issue of whether or not there was willful misconduct so as to bar a maintenance and cure claim is a factual issue for the jury, not an issue of law. *Connolly v. Farrell Lines, Inc.*, 268 F.2d 653, 656-7 (1st Cir. 1959).

The jury in the case at bar made a determination, after having heard all the facts about the sort of discipline that was maintained on the vessel, that Garay had engaged in willful misconduct. The panel agreed that there was sufficient evidence to support a finding of intoxication. *Garay*, 904 F.2d at 1531; (App. 9). The jury's evaluation of conflicting evidence is conclusively binding on appeal. *Rock v. McCoy*, 763 F.2d 394, 396 (10th Cir. 1985). Carnival should not then be stripped of its Seventh Amendment right to a jury determination of this issue.

III.

THE DECISION OF THE 11TH CIRCUIT DIRECTLY CONFLICTS WITH THE CLEAR PRECEDENTS OF OTHER CIRCUITS WHICH HOLD THAT PUNITIVE DAMAGES (BEYOND ATTORNEY'S FEES) ARE NOT RECOVERABLE IN A MAINTENANCE AND CURE CLAIM.

The Eleventh Circuit's opinion remanded this case for a determination of not only the amount of maintenance and cure but also a determination of whether punitive damages should be awarded. The circuits are divided as to whether punitive damages may be awarded in a maintenance and cure claim at all.

Kraljic v. Berman Enterprise, Inc., 575 F.2d 412 (2d Cir. 1978) and *Owens v. Conticarriers & Terminals, Inc.*, 591 F.Supp. 777 (W.D. Tenn. 1984) disallowed punitive damages (although not

attorney's fees) even where there had been a showing of an arbitrary and bad faith failure to furnish maintenance and cure. Other courts have allowed punitive damages awards (in addition to attorneys' fees) for a willful and arbitrary refusal to pay maintenance and cure. *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110 (5th Cir. 1984); *Morales v. Garijak*, 829 F.2d 1355 (5th Cir. 1987); *Robinson v. Pocahontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973). A discussion of this split in authority may be found in Norris, *The Law of Seamen* § 26:41 (4th Ed. 1985).

One panel of the Eleventh Circuit has noted this split of authority, but has permitted recovery of both punitive damages and attorneys' fees in a maintenance and cure claim. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir. 1987). Thus, even though Carnival pointed out its position on this split of authority in both the trial court (R. 6-186) and in its brief on appeal (Br. 36), both the trial court and the 11th Circuit were bound by the opinion in *Hines*. Indeed the opinion found "no error" in *Hines*. *Garay*, 904 F.2d at 1534, n.10; (App. 15, n.10).

Therefore, Carnival requests that this Court review this matter in order to resolve this split between the circuits. Carnival asserts that this Court's decision in *Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962) suggests (although it does not explicitly state) that the Second Circuit's decision in *Kraljic* is correct. As pointed out in *Kraljic*, the dissenters in *Vaughan* wanted the jury to award punitive damages in their discretion without limitation. This was apparently rejected by the majority in *Vaughan*.

Such a determination would be particularly timely in view of the Supreme Court's statements in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S.Ct. 2909, 2921, 2923 (1989) where both the majority and concurring opinions suggested, but did not decide, that the due process clause in the U.S. Constitution may place limits on punitive damages awards in civil cases brought by private parties. In this

environment, it would be appropriate for this Court to determine whether, after an apparent change in the law on the issue of whether intoxication is an absolute defense to a maintenance and cure claim, it is a violation of due process for Carnival to be subjected to a remand for a determination on the issue of punitive damages where the only question will be whether Carnival arbitrarily and willfully refused to provide maintenance and cure.

It is Carnival's position that the award of any punitive damage against it on remand would violate its rights under the United States Constitution including, but not limited to, the due process clauses, the equal protection clause, the double jeopardy clause, and the prohibitions against *ex post facto* laws. We note that the United States Supreme Court has recently heard oral argument in a case involving the constitutionality of a punitive damage award in a case controlled by state insurance law. *Pacific Mutual Life Insurance Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), *certiorari granted*, 110 S.Ct. 1780 (April 2, 1990). Carnival submits that the case at bar presents a good opportunity for this Court to determine an issue of punitive damages controlled by Federal (not state) law.

Punitive damages are not an appropriate part of a maintenance and cure claim. Liability for maintenance and cure is not predicated on fault or negligence. *Aguilar*, 318 U.S. at 731. Maintenance and cure is in a sense an implied *contractual* obligation. *Vaughan, supra* 369 U.S. at 532, 533, 82 S.Ct. at 1000, 1001; *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979); Norris, *The Law of Seamen*, § 26:10 (4th Ed. 1985). Punitive damages are not generally recoverable even for a capricious and malicious breach of contract. 25 C.J.S. Damages § 120. Thus, punitive damages (beyond attorneys' fees) should not be allowed for even a willful and arbitrary breach of a maintenance and cure obligation.

Even if this Court decides to deny a review on Points I and II of the brief, Carnival requests that this Court neverthe-

less consider the punitive damages question. It would be unjust and unfair to subject Carnival to a punitive damage claim based on a change in the law. Before the 11th Circuit's opinion was issued, there was no exception to the "intoxication as a defense" rule based on an employer's conduct in permitting drinking on board a vessel. Carnival was entitled to rely on a long-standing series of cases allowing intoxication as a defense to a maintenance and cure claim.

Carnival's reliance was not frivolous. There were sufficient facts to convince a jury that the defense was well founded and sufficient facts to have the trial judge deny Garay's motion for a directed verdict and motion for a new trial. Under those circumstances, Carnival's failure to pay maintenance and cure up to the point of maximum medical improvement was, as a matter of law, *not* arbitrary, *not* without reason, and *not* with callous disregard for the seaman.

A punitive damage claim serves no purpose other than to punish a defendant employer. Any other damages caused by delay in treatment for a seaman are potentially recoverable in a typical seaman's case.

Carnival also requests that the court consider the constitutional implications mentioned previously. At the first trial, Garay's attorney asked for $12 million in punitive damages (R. 12-765). Subjecting Carnival to this large a claim based merely on a jury's determination of the very vague concepts of arbitrariness and willfulness (after having stripped from Carnival a previously viable defense) does not constitute due process.

Just as ship owners are entitled to rely on reports of a treating physician so as to avoid a punitive damage claim in a maintenance and cure case [*Harrell v. Dixon Bay Transportation Co.*, 718 F.2d 123, 129130 (5th Cir. 1983); *Ward v. Inland Marine Services, Inc.*, 1987 AMC 1282 (N.D. Fla. 1987)], Carnival should be permitted to rely upon the law as it existed before the panel opinion to avoid punitive damages.

The jury made a determination that Carnival was not liable for punitive damages. This determination was separate and independent from the finding of willful misbehavior. Carnival should not be stripped of its 7th Amendment rights to that jury finding.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the 11th Circuit.

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Telephone: (305) 372-2400

DATED: November 30, 1990.

CERTIFICATE OF SERVICE

I, RODNEY EARL WALTON, being over the age of 18 years, hereby certify that I have this 30th day of November, 1990, served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit on the Law Offices of Charles Lipcon, Suite 2480, One Biscayne Tower, Two South Biscayne Boulevard, Miami, Florida 33131, and to Brett Rivkind, Esq., Concord Building, Suite 600, 66 West Flagler Street, Miami, Florida 33130, by mailing said copies in sealed envelopes, first class, postage prepaid, deposited at the Post Office Box of the Miami Center, 201 South Biscayne Boulevard, Miami, Florida.

By: Rodney Earl Walton
Rodney Earl Walton

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UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

BALBINO JIMENEZ GARAY,
Plaintiff-Appellant,

v.

CARNIVAL CRUISE LINE, INC., et al.,
Defendants-Appellees.

July 10, 1990.

Seaman brought action against shipowner for maintenance and cure, Jones Act negligence, and unseaworthiness after he suffered severe head injuries when he fell down flight of stairs on board ship. After denying seaman's motion for directed verdict on willful misconduct defense, the United States District Court for the Southern District of Florida, No. 86-689-CIV-KLR, Kenneth L. Ryskamp, J., 716 F.Supp. 1421, granted shipowner's motion for judgment notwithstanding verdict on claim that ship failed to provide seaman with prompt and adequate treatment. Seaman appealed. The Court of Appeals, Kravitch, Circuit Judge, held that: (1) there was sufficient evidence of seaman's intoxication at time he was injured, but (2) intoxication could not constitute willful misconduct, given ship's tacit policy of permitting drunkenness on board, and seaman was entitled to new trial.

Reversed and remanded.

1. Seamen — 11(5)
Seaman will not lose his right to maintenance and cure unless he engages in positively vicious conduct, such as gross negligence or willful disobedience of orders.

2. Seamen — 11(1)
Seaman who is injured during pursuit of recreational activities should receive maintenance and cure, whether injury was suffered ashore or abroad.

3. Seamen — 11(5)

If seaman is injured through his willful misconduct, shipowner is relieved of his duty of providing maintenance and cure.

4. Seamen — 11(9)

Jury could find that injured seaman was intoxicated at time of fall, for purposes of seaman's claim for maintenance and cure, even though testimony of persons who examined seaman after his fall downstairs and while he was unconscious that seaman's breath smelled of alcohol was extremely weak evidence of intoxication; seaman had been ashore drinking in the afternoon, imbibing four to six beers in course of no more than two hours.

5. Seamen — 11(5)

Defense of willful misconduct was not available to shipowner upon injured seaman's claim for maintenance and cure, notwithstanding evidence that seaman had been drinking when he fell down stairs, given ship's tacit policy of permitting drinking and even drunkenness on board.

6. Seamen — 11(1)

Shipowner's failure to pay maintenance and cure may support cause of action under Jones Act for breach of duty to provide maintenance and cure. Jones Act, 46 U.S.C.A.App. § 688.

7. Federal Courts — 945

Seaman was entitled to new trial on damage issues in action for maintenance and cure, as result of reversal on appeal of district court's denial of his motion for directed verdict on shipowner's willful misconduct defense.

Brett Rivkind, Miami, Fla., for plaintiff-appellant.

Rodney E. Walton, Kelley, Drye & Warren, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and KAUFMAN*, Senior District Judge.

KRAVITCH, Circuit Judge:

Balbino Jimenez Garay ("Garay"), a seaman on board the vessel Tropicale, chartered by Carnival Cruise Lines, Inc. ("Carnival"), suffered severe head injuries when he fell down a flight of stairs on board the ship. Garay and Carnival on the basis of maintenance and cure, and Jones Act negligence (including a claim for failure to provide adequate treatment) and unseaworthiness. Carnival asserted as a defense to maintenance and cure that the seaman had suffered injury as the result of his own willful misconduct, and the district court refused to grant Garay's motion for a directed verdict against Carnival on that defense. The jury found for the plaintiff only on his claim that the ship failed to provide him with prompt and adequate treatment. The district court, however, concluding that there was no evidence of Carnival's failure to treat promptly and adequately in accordance with its duties, granted Carnival's motion for judgment notwithstanding the verdict. 716 F.Supp. 1421. Garay appeals the grant of JNOV and the court's refusal to direct a verdict against Carnival on the willful misbehavior defense; he also challenges the admission of videotaped deposition testimony. We reverse the district court's failure to direct a verdict on the willful misconduct defense because, as a matter of law, the evidence was insufficient to establish any willful misconduct on the part of Garay.[1]

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* Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

[1] Garay assigns as error a number of the district court's instructions to the jury. Trial counsel, however, acquiesced in those instructions, and therefore the claims were waived on appeal. Under Fed.R.Civ.P. 51, the party objecting must state "distinctly the matter objected to and the grounds of the objection." *See McElroy v. Firestone Tire & Rubber Co.*, 894 F.2d 1504, 1510-11 n. 10 (11th Cir.1990) (acquiescence); *Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524, 1528-29 (11th Cir.1988) (specific objection required). By way of example, we note the following: at the charge conference, Plaintiff's counsel stated that he "object[ed] to this one about the bad

BACKGROUND

The accident occurred at approximately 7:30 in the evening. Garay had been ashore that afternoon, and between 2:30, when he went ashore, and 4:30, when he returned to the ship, he consumed four to six beers. On the way back to the ship he bought a bottle of vodka. Lazaro Ochoa, who saw Garay shortly before the accident, testified that he was intoxicated. The one crew member who saw the accident stated that Garay slipped on the third step, which was wet and waxy.[2] Others stated that after Garay's fall he smelled strongly of alcohol. Garay was given emergency treatment on board the vessel, temporarily placed in the ship's hospital, and was then taken ashore in Puerto Vallarta, Mexico, where the ship was docked. Thereafter he was evacuated to San Pedro, California, where he received brain surgery and continued to receive treatment at the defendant's expense for three weeks, at which time he was repatriated to Honduras.

Garay, alleged that his injuries were caused by the defendant's negligence or by the unseaworthy condition of the vessel. He further alleged that he was entitled to maintenance and cure to the point of maximum medical improvement ("MMI"). Finally, he alleged that Carnival failed to provide prompt and adequate medical attention, and that such failure had aggravated his injuries. The jury found against Garay on the negligence and unseaworthiness claims. Further, the jury found that his injuries were the result of

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faith." By reviewing the transcript of the charge conference, we discern that counsel was referring to the punitive damages charge, but we are unable to identify the grounds for his complaint to the district court. Because counsel did not set forth the reasons for his objection, we conclude that the objection was not preserved.

Garay also complains of a discovery abuse relating to Ochoa's deposition. In light of *Britt v. Corporacion Peruana de Vapores*, 506 F.2d 927, 932 (5th Cir.1975), we find Garay's contention meritless.

[2] The jury, finding that there was no negligence on the part of Carnival or unseaworthy condition on the vessel, apparently did not credit this witness's testimony. His description of who came to the scene of the accident and how Garay was treated was inconsistent with the accounts of all others who were there and testified.

his own willful misbehavior, thus disentitling him to maintenance and cure. Finally, however, the jury found for the plaintiff in the amount of $275,000 to compensate him for Carnival's negligent failure to provide Garay with prompt and adequate medical care, which failure caused him additional pain and disabiity, or prolonged his recovery. The district court granted the defendant's motion for JNOV on the failure to treat claim, on the ground that there was no support for the claim under the law or the evidence provided: insofar as Garay alleged negligent treatment, there was no evidence to support the claim; and insofar as he alleged that he was discharged before attaining maximum medical improvement, that allegation did not state a claim under the failure to treat doctrine as the shipowner had no duty to treat to the point of MMI. We reverse the district court's refusal to grant a directed verdict on the issue of willful misconduct because, given the ship's tacit policy of permitting drunkenness on board, intoxication could not constitute willful misconduct on board the Tropicale.

WILLFUL MISBEHAVIOR

A shipowner bears a large share of responsibility for the welfare of his crew. The seaman's life is hazardous—often requiring him to voyage far from shore, home, and medical help—and the shipowner must provide medical treatment and support for the seaman who becomes ill or is injured while in the service of the ship. Under maritime law, the seaman's right is called "maintenance and cure." Even if the seaman is injured through his own negligence, he does not forfeit his right to maintenance and cure.

> Among the most pervasive incidents of the responsibility anciently imposed upon a shipowner for the health and security of sailors was liability for the maintenance and cure of seamen becoming ill or injured during the period of their service. In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. Created thus with the

> contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner. Whether by traditional standards he is or is not responsible for the injury or sickness, he is liable for the expense of curing it as an incident of the marine employer-employee relationship.

Aguilar v. Standard Oil Co., 318 U.S. 724, 730, 63 S.Ct. 930, 933-34, 87 L.Ed. 1107 (1943) (footnotes and citations omitted).

[1] In *Warren v. United States*, the Court declared that a seaman will not lose his right to maintenance and cure unless he engages in "positively vicious conduct—such as gross negligence or willful disobedience of orders." 340 U.S. 523, 528, 71 S.Ct. 432, 435, 95 L.Ed. 503 (1951) (citations omitted). In *Farrell v. United States*, the Court described the general right of the seaman to maintenance and cure while noting the almost paternalistic duty of the shipowner toward the crew:

> Aside from gross misconduct or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however decisive it may be as to claims for indemnity or for damages for negligence...
>
> It has been the merit of the seaman's right to maintenance and cure that it is so inclusive as to be relatively simple, and can be understood and administered without technical considerations. It has few exceptions or conditions to stir contentions, cause delays, and invite litigations. The seaman could forfeit the right only by conduct, whose wrongful quality even simple men of the calling would recognize—insubordination, disobedience to orders, and gross misconduct. On the other hand, the Master knew he must maintain and care for even the erring and careless seaman, much as a parent would a child.

336 U.S. 511, 516, 69 S.Ct. 707, 709-10, 93 L.Ed. 850 (1949).

In *Farrell*, the injured seaman was returning late from shore leave in disobedience of his orders. Nonetheless, the Court held that he was "entitled to the usual measure of maintenance and cure at the ship's expense..." 336 U.S. at 517, 69 S.Ct. at 710.

> So broad is the shipowner's obligation that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the repsonsibility. Conceptions of contributory negligence, the fellow-servant doctrine, and assumption of risk have no place in the liability or defense against it. Only some willful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The traditional instances are venereal disease and injuries received as a result of intoxication, though on occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore.

Aguilar, 318 U.S. at 731, 63 S.Ct. at 934.

[2] The law also recognizes that seamen must relax in order to work effectively. Accordingly, a seaman injured during the pursuit of recreational activities should receive maintenance and cure, whether the injury was suffered ashore or abroad. *Compare Warren*, 340 U.S. at 529-30, 71 S.Ct. at 435-36 *with Aguilar*, 318 U.S. at 734-35, 63 S.Ct. at 935-36. In *Warren* for example, a seaman ashore, having had some wine, albeit an insufficient amount to cause intoxication, leaned from an unprotected dance hall balcony, grabbed hold of an iron rod, and fell with resultant injury when the rod gave way.

[3] If, however, the seaman is injured through his willful misconduct, the shipowner is relieved of his duty of providing maintenance and cure, and Garay argues that the district court erred in refusing to grant his motion for a directed verdict on the defense of willful misconduct raised by Carnival. Garay presses two grounds: first, that the evidence was insufficient to establish intoxication, and, second, that even if the evidence of intoxication is sufficient, mere intoxication

in this case does not establish willful misconduct.

Evidence of Intoxication

[4] According to Garay, there was insufficient evidence to support Carnival's claim that he was injured as the result of his intoxication. The facts, however, were as follows: Garay had been ashore drinking in the afternoon, imbibing four to six beers in the course of no more than two hours.[3] At the time of his accident, he was supposed to be in uniform and on duty as an assistant cabin steward, but according to Ochoa's testimony, Garay was out of uniform, "very intoxicated" and unable to perform his duties. Ochoa, however, provided no concrete basis for his opinion: he reported no indicia of drunkenness, such as staggering or slurred speech. A number of ship personnel who examined Garay after his accident, including the doctor and nurse, stated that he smelled strongly of alcohol. No tests were performed to determine the injured man's blood alcohol content, nor was there any evidence of motor coordination problems as the patient was unconscious.

The testimony of persons who examined Garay after his fall and while he was unconscious that his breath smelled of alcohol is extremely weak evidence of intoxication in that a person who consumed no more than one beer would have the smell of alcohol on the breath. Nevertheless, Garay concedes in his brief that considering "the evidence at trial in the light most favorable to the Defendant, the Plaintiff fell down the stairs in an intoxicated condition." In light of the evidence, reasonable jurors could have concluded that Garay was intoxicated. *C.f. Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir.1969) (en banc) (where there is "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different con-

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[3] Although he purchased a liter bottle of vodka before returning to the ship, we do not attach great importance to the fact because there was no evidence that the bottle of vodka was ever opened.

clusions" motion for directed verdict should be denied).[4]

Legal Effect of Permitted Intoxication

[5] There remains the question of whether evidence of intoxication can, as a matter of law, on the facts of this case constitute willful misconduct.

Garay argues that the evidence of intoxication, without more, is not enough to demonstrate willful misconduct because drinking and even drunkenness by crew members were permitted on board. We agree. Where the crew is permitted to drink, even to the point of drunkenness, and the ship's captain and officers are aware that crew members have been, are, and will be drunk on board, and the ship does not prohibit such behavior on the part of the crew, we cannot say that a seaman who indulges in intoxicating liquors is engaging in "willful misconduct" that is "positively vicious" or the deliberate disobedience of orders.

This is not a case like *Reyes v. Vantage S.S. Co.*, 558 F.2d 238 (5th Cir.1977), *modified*, 609 F.2d 140 (1980) (clarifying causation) where the ship was unseaworthy because it was operated like a "floating dram shop." 558 F.2d at 244. In this case, the unseaworthiness claim was laid to rest by the jury verdict. The focus here is on the seaman's conduct and whether it constituted willful misbehavior. The ship policy concerning the consumption of alcohol and the sobriety of seamen is relevant in considering whether or not Garay was willfully misbehaving by being intoxicated on board. Where the shipowner condones drunkenness aboard his vessel, we cannot say that a seaman who is drunk is willfully misbehaving, such that we could term the conduct "positively vicious...such as gross negligence or willful disobedience of orders." *Warren*, 340 U.S. at 528, 71 S.Ct. at 435.

Our decision is not contrary to *Dailey v. Aloca Steamship*

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[4] The Eleventh Circuit, in the en banc decision *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981), adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Co., 337 F.2d 611 (5th Cir.1964) where the court of appeals explicitly affirmed the district court's ruling that the seaman's "intoxication constituted misconduct barring recovery [from the shipowner]." 337 F.2d at 612. The seaman there, a chronic alcoholic, was absent from his ship without leave in disobedience of his orders. While ashore and intoxicated, he fell from a bar stool and broke his leg. The court stated that "[w]hen the seaman's injures are caused by his intoxication, they are held to be occasioned by his misconduct, thus relieving the shipowner of the duty to provide maintenance and cure." *Id.* (quoting from and affirming order of district court). Significantly, the district court found that Dailey had "violated the orders of his superior officer to the extent that discharge from employment therefore was in order at the discretion of his superior officer." 337 F.2d at 612 (quoting from district court order).

In the instant case, however, the ship's crew testified that drinking and drunkenness were expected and condoned, and that dismissal would be an unusual result. Seaman Ochoa agreed that it was "[O]kay to be drunk as long as you didn't disturb or bother anyone else..." Seaman Chimilo declared that when the ship was in port, he saw "many seaman in the kitchen drunk...that's a normal thing, you know, when the ship arrives to port, everybody drinks." Carnival's Director of Operations stated that drinking by crew while on the ship was "part of the recreation to let them relax after working during the day, to sit down and have a drink." In fact, the ship provided a crew bar, where crew members could buy unlimited beer. Further, crew members could purchase spirits in the ship's gift shop. The Staff Captain, Mario Casari, testified in his deposition that "normal drinking" was accepted, by which he meant "You drink a couple of beers during the day and having been a little bit drunk a couple of times, two or three times a month, you know, that's basically what is a little bit overlooked and basically accepted." He added that a seaman shouldn't drink so much that he was "dangerous" to himself or others, but he added, "[Y]ou couldn't

fire anybody because he is drinking once in a while." Casari stated that he knew he would have drunk crew members on board, and he admitted that a seaman's frequent drunkenness would be tolerated "[i]f he was not causing any problems and if he was doing his job.... We tried not to fire people." Explaining why the ship both declined to fire intoxicated seamen and provided an onboard crew bar, Casari acknowledged, with unintended irony, "You can't look both ways." We agree. Carnival cannot look on the seaman's drunkenness as a tolerable and acceptable condition, tacitly encouraged by the rarity of any imposition of discipline, and operation of the crew bar, and at the same time ask us to view Garay's alleged intoxication as willful misconduct.[5]

As a matter of law, therefore, we hold that the defense of willful misconduct is not available to Carnival because drunkenness on the part of seamen was not "misconduct" on board the Tropicale. The district court thus erred in failing to grant Garay's motion for a directed verdict on willful misconduct. *Cf. Boeing Co. v. Shipman*, 411 F.2d at 374.

We emphasize that this decision should not be read as a holding that intoxication cannot constitute willful misbehavior; shipowners may avoid maintenance and cure payments for a seaman's injuries caused by intoxication if the shipowner makes clear that intoxication is misconduct, is considered misbehavior by the shipowner, and is treated as such.

JONES ACT CLAIM ON PROMPT AND ADEQUATE MEDICAL CARE

[6] In addition to maintenance and cure, a seaman may recover against a shipowner under the Jones Act if the shipowner was negligent or the ship was unseaworthy. A ship-

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[5] That Garay was absent from his work station does not mandate a contrary result as his absence from work was not the cause of his injury, nor was it the sort of "positively vicious" conduct that should disentitle him to maintenance and cure.

owner's failure to pay maintenance and cure not only give rise to a claim for maintenance and cure, but may also support a cause of action under the Jones Act for breach of the duty to provide maintenance and cure. *See infra* note 8.

The district court set aside the jury's award of damages on the failure to provide prompt and adequate medical care, reasoning that the shipowner had breached no duty to provide treatment to the point of MMI because that duty of treatment only arises when the shipowner is under a duty to provide maintenance and cure. As a result, Garay argued to this court on the theory that he should recover under the Jones Act because his "premature" discharge was negligent, regardless of any duty under maintenance and cure to provide treatment until MMI. That argument is without merit.[6] Nonetheless, given our disposition of the willful misconduct issue, it is clear that Garay was entitled to cure. Moreover, the law is clear that a seaman is entitled to cure until he is declared to have reached maximum medical improvement. *Cf. Vella v. Ford Motor Co.*, 421 U.S. 1, 4-6, 95 S.Ct. 1381, 1383-84, 43 L.Ed.2d 682 (1975) (maintenance and cure continues until such time as the incapacity is declared to be permanent).

Garay raises this argument under the rubric of failure to provide prompt and adequate treatment, but the duty of the

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[6] Although a seaman's willful misconduct will disentitle him to maintenance and cure, the shipowner still promptly must provide adequate emergency medical care (as is reasonable under the circumstances) for the injured seaman. This naturally follows from the nature of the seaman's work. Even if injured through his own willful misconduct, the seaman is at the mercy of the shipowner. The seaman may be many miles offshore, unable to leave the ship and unable to obtain his own medical care. The law, therefore, requires the shipowner to provide such prompt and adequate medical care as is reasonable under the circumstances. *See Barlow v. Pan Atlantic S.S. Corp.*, 101 F.2d 697 (2d Cir.1939); *cf. The Iroquois*, 194 U.S. 240, 24 S.Ct. 640, 48 L.Ed. 955 (1904) (where seaman injured in service of ship, master had duty to put in to port in order to provide adequate treatment).

The shipowner in this case provided prompt and adequate emergency care on board the vessel, and further provided for evacuation ashore to the local port and later to better medical facilities in San Pedro. As the district court noted below, where there is no duty to provide maintenance and cure, the shipowner's duty to provide non-negligent medical care would, if construed to the limits of MMI, swallow up maintenance and cure.

shipowner to provide such treatment stems, as a general matter, from the shipowner's duty to provide maintenance and cure, which is anchored in ancient maritime law.[7] Certainly if the shipowner had a duty to provide care to the point of MMI, as a shipowner would if the seaman were entitled to maintenance and cure, then discharge before the attainment of MMI would be a breach of the duty owned under maintenance and cure.[8]

The jury verdict as expressed in the special interrogatories, is inconsistent. For example, the jury found that there was no negligence on the part of Carnival and that Garay was not entitled to cure because of his willful misconduct, but the jury nonetheless awarded the plaintiff $275,000 for the "additional pain, disability or prolonged suffering [caused by Carnival's failure] to promptly provide [sic] him with adequate medical care." The only theory presented to the jury upon which it could have found inadequate treatment was Carnival's refusal to pay for further cure as there was no allegation that the treatment actually provided was negligent or inadequate. Indeed, Garay's complaint was that he was denied the continuation of the treatment, not that the treatment was defective. Unless Carnival had a duty, however, to provide further medical treatment, the refusal to continue treatment was no breach. The jury verdict on damages for failure to provide adequate medical treatment is not a proxy for a determination of damages on the maintenance and cure issue because the jury was instructed that it should award damages

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[7] Ancient codes of the sea provided the seaman's right to maintenance and cure long before Congress saw fit to enact the Jones Act. for example, the laws of Oleron, promulgated about 1200 A.D. laid forth the forerunner to modern maintenance and cure. *See* 1B *Benedict on Admiralty* § 41.

[8] Indeed, the negligent refusal to provide maintenance and cure may give rise to a tort action under the Jones Act. *Picou v. American Offshore Fleet, Inc.*, 576 F.2d 585, 587-88 (5th Cir.1978); *see also Morales v. Garijak, Inc.*, 829 F.2d 1355, 1358 (5th Cir.1987) (punitive damages and attorney's fees); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138, 140 (5th Cir.1986) (vicarious liability for negligent medical treatment by physician selected by shipowner).

for failure to provide adequate treatment based on the "aggravation portion only of the plaintiff's injures." The district court explicitly instructed the jury that the aggravation damages could not duplicate the award of damages for claims under the Jones Act or maintenance and cure.

[7] Because the district court erred in refusing to grant Garay's motion for a directed verdict on Carnival's defense of willful misconduct, the subsequent jury findings are unreliable. Had the directed verdict been granted, the jury would have been compelled to find that Garay was entitled to maintenance and cure. Having concluded that Garay was entitled, as a matter of law, to maintenance and cure, it is for the trier of fact to determine the amount due. Once the shipowner was under a duty to supply maintenance and cure, the shipowner's failure to comply could have been a breach under the Jones Act.[9] That theory, however, was neither argued to the jury nor presented by the plaintiff's requested instructions; we decline to remand for trial of an issue that was neither presented to the initial jury, nor presented to us on appeal. The jury's seaworthiness conclusion is in no way affected by this appeal.

Carnival argues that the punitive damage claim should have been dismissed by the district court, and that on remand the plaintiff should not be permitted to present his claim for punitive damages. The claim for punitive damages, however, is implicated by our decision that Garay was entitled to maintenance and cure, as the jury was instructed that if the plaintiff was entitled to maintenance and cure and the shipowner arbitrarily and willfully refused to provide it, then the plaintiff was entitled to recover punitive damages.[10] Willful-

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[9] *See supra* note 8.

[10] Carnival also suggests that *Hines v. LaPorte, Inc.*, 820 F.2d 1187 (11th Cir.1987), which provides for the recovery of punitive damages and attorney's fees, was wrongly decided. We see no error in *LaPorte*, and moreover, only an en banc court or the Supreme Court can overrule circuit precedent.

ness and arbitrariness were defined as "without reason or with callous disregard for the claim of the seaman," and the jury is well-suited to make such a determination. Now that we have determined that Garay was entitled to cure, a jury could find that the failure to provide it was arbitrary and willful. We intimate no view of the merits of Garay's claim, as that is not our province. On remand the trier of fact should determine the amount of maintenance and cure due Garay, and whether punitive damages should be awarded.

CONCLUSION

Because as a matter of law Garay's conduct did not constitute willful misconduct, the district court erred in failing to grant his motion for a directed verdict on that issue. Accordingly, Garay is entitled to a new trial on the damage issues stemming from our reversal.

We therefore REVERSE and REMAND.

UNITED STATES DISTRICT COURT
S.D. FLORIDA

BALBINO JIMENEZ GARAY,

Plaintiff,

v.

CARNIVAL CRUISE LINES, INC.

Defendant

March 14, 1989

Seaman brought action against shipowner for negligence under Jones Act, unseaworthiness, failure to provide maintenance and cure, failure to treat, and punitive damages. Jury returned verdict for defendant on all claims except failure to treat claim and both parties moved for judgment notwithstanding verdict. The District Court, Ryskamp, J., held that shipowner's duty to provide prompt medical care did not require that it treat seaman until he reached maximum medical improvement.

Plaintiff's motion denied, defendant's motion granted.

1. Seamen — 11(5)

Where seaman's drunkeness was cause of his injury, seaman was not entitled to maintenance and cure.

2. Seamen — 11(9)

On "failure to treat" claim, seaman's recovery is limited to punitive damages and damages for aggravation in seaman's condition caused by defendant's failure to treat.

3. Seamen — 11(6)

Shipowner's duty to provide prompt medical care did not require that it treat injured seaman until he reached maximum medical improvement and thus, seaman had no claim for failure to treat where shipowner's initial treatment of seaman was prompt and adequate and continued for three

weeks after accident.

Charles R. Lipcon of Fields & Rosen, Miami, Fla., for plaintiff

Rodney Earl Walton of Kelley Drye & Warren, including Smathers & Walton, Miami, Fla., for defendant.

FINAL JUDGEMENT NOTWITHSTANDING THE VERDICT

RYSKAMP, District Judge.

THIS CAUSE is before the court upon defendant's and plaintiff's motions for judgment notwithstanding the verdict and defendant's motion to alter or amend judgment. Plaintiff, Balbino Garay, brought this suit in admiralty for injuries suffered while working as an employee on one of defendant's ships. The jury returned a verdict for defendant on all but one count, but awarded Garay $275,000.00 on the failure to treat claim. Because the evidence is insufficient to support a verdict in favor of the plaintiff, *Nettles v. Electrolux Motor AB*, 784 F.2d 1574 (11th Cir.1986), the court must grant defendant's motions and deny plaintiff's motion.

I. FACTUAL BACKGROUND

Until January 23, 1985, Garay was a seaman on the vessel Tropicale, owned by defendant. On that day, he was found unconscious at the bottom of a stairway on the ship. Garay claims he slipped and fell due to the wax and water on the stairs. Defendant presented evidence that Garay's intoxication caused the accident. He was immediately given medical treatment on the ship, as well as on shore at the nearest port, Puerto Vallarta, Mexico.

For three weeks, Garay received treatment and therapy at a hospital in San Pedro, California at defendant's expense. In late February, he returned home to his family in Honduras, accompanied by a nurse. Defendant also gave Garay funds to cover maintenance and cure for three months.

Garay sued, alleging five claims: 1) negligence under the Jones Act, 2) unseaworthiness, 3) failure to provide maintenance and cure, 4) failure to treat, and 5) punitive damages. The case was tried in September 1988 and the jury returned a verdict for the defendant on all claims except the failure to treat claim and awarded plaintiff $275,000.00. Garay's maintenance and cure claim failed because the jury found that his injuries were the result of willful misbehavior, namely his intoxication at the time of the accident.

Garay's failure to treat claim is grounded in defendant's failure to provide more than three weeks of therapy following the accident. He claims defendant is required to provide cure until maximum medical improvement ("MMI"), *Farrell v. United States*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949), and that Garay never reached MMI.

II. DEFENDANTS MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendant, in its motion for judgment notwithstanding the verdict, argues there can be no recovery for failure to treat where there is no liability for maintenance and cure because of willful misbehavior. Garay responds that willful misbehavior does not preclude recovery under the Jones Act and that his drunkeness does not prevent recovery for a failure to treat.

1. The Negligence and Unseaworthiness Claims

The apparent conflict in the jury verdict is a result of a misperception of the various claims made by Garay. The Jones Act, 46 U.S.C.App. § 688, requires proof of negligence and imposes the same duties on shipowners as federal law imposes on railroad owners. *Jacob v. New York*, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1942). The jury found that there was no negligence on the part of defendant that was the legal cause of plaintiff's injuries, so there can be no recovery under the Jones Act. The jury also found for the defendant on the unseaworthiness claim. These claims cannot be the basis of any recovery.

2. Maintenance and Cure

A claim for maintenance and cure arises out of the shipowner's traditional responsibility for his crew. The shipowner's duty to provide medical treatment for the seaman who becomes ill or is injured while in the service of the ship derives from the unique hazards which attends the work of seamen. *Vella v. Ford Motor Co.*, 421 U.S. 1, 95 S.Ct. 1381, 43 L.Ed.2d 682 (1975). Because a ship is often far removed from civilization, the captain or shipowner must assume responsibility for the welfare of his crew. Even if injured by accident or through his own fault, a seaman should be cared for by the shipowner and not "left for the sharks." "So broad is the shipowner's obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of the responsibility." *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730-731, 63 S.Ct. 930, 933-934, 87 L.Ed. 1107 (1943).

Generally, the seaman is entitled to maintenance (living expenses while he recovers) and cure (medical attention) until he reaches MMI, or maximum cure, the point after which further treatment will not improve the seaman's condition. *Pelotto v. L & N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). The seaman should show he was injured in service to the ship, but this requirement is interpreted liberally to allow recovery because "it is the ship's business which subjects the seaman to risks" outside the direct scope of his duties. *Aguilar*, 318 U.S. at 734, 63 S.Ct. at 935. When there are ambiguities or doubts, they are resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S. 527, 532, 82 S.Ct. 997, 1000, 8 L.Ed.2d 88 (1962). Only some willful misbehavior or deliberate act of indiscretion, such as drunkenness or illicit intercourse resulting in the contraction of a venereal disease, will deprive the seaman of this protection. *Aguilar*, 318 U.S. at 731, 63 S.Ct. at 934.

[1] In the instant case, the jury found that Garay's willful misbehavior, his drunkenness, was the cause of the accident and that he could not recover on this count. Therefore, a

maintenance and cure claim cannot be the basis of any recovery.

3. Failure to Treat

A claim for failure to treat also arises from the traditional duty of a shipowner to care for his crew. A plaintiff may recover for any additional injuries caused by the shipowner's unreasonable failure to treat or to provide prompt medical care. *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 687 (10th Cir.1981). This basic responsibility is separate from a duty of maintenance and cure and should attach regardless of the seaman's negligence or misbehavior. "It would be inhumane to leave a helpless man without succor." *The Quaker City*, 1 F.Supp. 840 (E.D.Penn.1931).

[2] This claim has also been characterized as a breach of the duty of maintenance and cure. In this form of the claim, plaintiff may recover if defendant unreasonably refused to provide maintenance and cure. *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1190 (11th Cir.1987). A related claim is for negligent treatment, where plaintiff may recover for damages caused by defendant's negligent medical treatment. *See, e.g., Ressler v. States Marine Lines, Inc.*, 517 F.2d 579, 1975 AMC 819 (2d Cir.1975). In all of these claims, plaintiff's recovery is limited to punitive damages and damages for the aggravation in plaintiff's condition caused by defendant's failure to treat, failure to provide maintenance and cure, or negligent treatment. *See Parker v. Texaco, Inc.*, 549 F.Supp. 71, 77 (E.D.La.1982).

The court has not been directed to, nor has uncovered, any cases where a successful claim for failure to treat was not grounded in either a duty to provide maintenance and cure, a successful claim of negligence, or an unseaworthiness claim. *See Ressler, supra; Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir.1987); *Parker, supra.*

Confusion may arise because case law, especially early law, emphasizes that the causes of action are separate and distinct,

while stressing the importance of the duty of care to the injured seaman. Thus, even if a man is injured as a result of his own willful misbehavior, the shipowner is responsible for giving him prompt medical attention, taking into account the circumstances. *See Barlow v. Pan Atlantic S.S. Corporation,* 101 F.2d 697 (2d Cir.1939). It is consistent with the traditional values underlying a shipowner's duty to his crew to impose liability for negligent treatment.

[3] In the instant case, though, Garay asks the court to extend this duty to provide prompt medical attention to encompass his subsequent therapy. The only testimony regarding negligent medical treatment involves that of Dr. Ahn and Dr. Smith, defendant's physicians. They both testified that Garay needed rehabilitation beyond the three week period in which he was treated in the San Pedro hospital. There is no testimony or evidence to support a finding that defendant, or its doctors, were negligent in their initial treatment of Garay or in the treatment he did receive. Therefore, Garay can only argue that the treatment should have been continued for longer than three weeks. Defendant's duty to provide prompt medical care does not require that it treat Garay until he reaches MMI. If it did, it would absorb duty to provide maintenance and cure, rendering that claim meaningless. There was no evidence adduced at trial from which the jury could find that defendant negligently failed to treat Garay.

The cases cited by plaintiff focus on the general duty of the shipowner and do not make the fine distinctions between the various causes of action, although they accurately reflect the liberality and compassion with which courts traditionally consider claims for injuries to seamen. Here, the evidence shows that defendant's initial treatment was prompt and adequate and continued for three weeks after the accident. Without a showing of some form of negligence or breach of some other duty, Garay cannot recover on a failure to treat claim.

III. PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

This motion claims a number of errors in rulings by the court regarding the admissibility of certain evidence and testimony. Plaintiff has directed the court to no case law in support of its contentions and has not established either a manifest error of law or fact or presented any newly discovered evidence. *See Federal Deposit Insurance Corp. v. Meyer,* 781 F.2d 1260, 1268 (7th Cir.1986).

IV. DEFENDANTS MOTION TO ALTER JUDGMENT

Plaintiff has not opposed this motion, which contends that interest should accrue at a rate certain from the date of the judgment, 28 U.S.C. § 1961, not "according to law," and that the court should not specifically reserve jurisdiction to consider costs. Local Rule 10(F), Southern District of Florida. Because the court is granting defendant's motion for judgment notwithstanding the verdict, this motion is moot.

V. CONCLUSION

Plaintiiff may not recover on a failure to treat claim, where there is no underlying finding of negligence or breach of duty for maintenance and cure and there is insufficient evidence from which reasonable minds could find that plaintiff did not receive prompt and adequate medical attention. *See Nettles, supra.* The court has discovered no errors in its rulings regarding the admissibility of certain evidence. After a careful review of the pleadings and the court being fully advised in the premises, it is hereby:

ORDERED and ADJUDGED that defendant's motion for judgment notwithstanding the verdict is GRANTED. Plaintiff's motion for judgment notwithstanding the verdict is DENIED. Defendant's motion to alter judgment is MOOT.

Further, final judgment is hereby entered in favor of defendant.

DONE and ORDERED.

THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-5319

BALBINO JIMENEZ GARAY,

Plaintiff- Appellant,

v.

CARNIVAL CRUISE LINE, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinon July 10, 1990, 11th Cir., 198__, ____F.2d____).
(September 6, 1990)

Before: FAY and KRAVITCH, Circuit Judges, and KAUFMAN*, Senior District Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis A. Kravitch
UNITED STATES CIRCUIT JUDGE

*Honorable Frank A. Kaufman, Senior U.S. District Judge for the District of Maryland, sitting by designation.

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-875

In The

Supreme Court of the United States

October Term, 1990

CARNIVAL CRUISE LINES, INC.,

Petitioner,

vs.

BALBINO JIMENEZ GARAY,

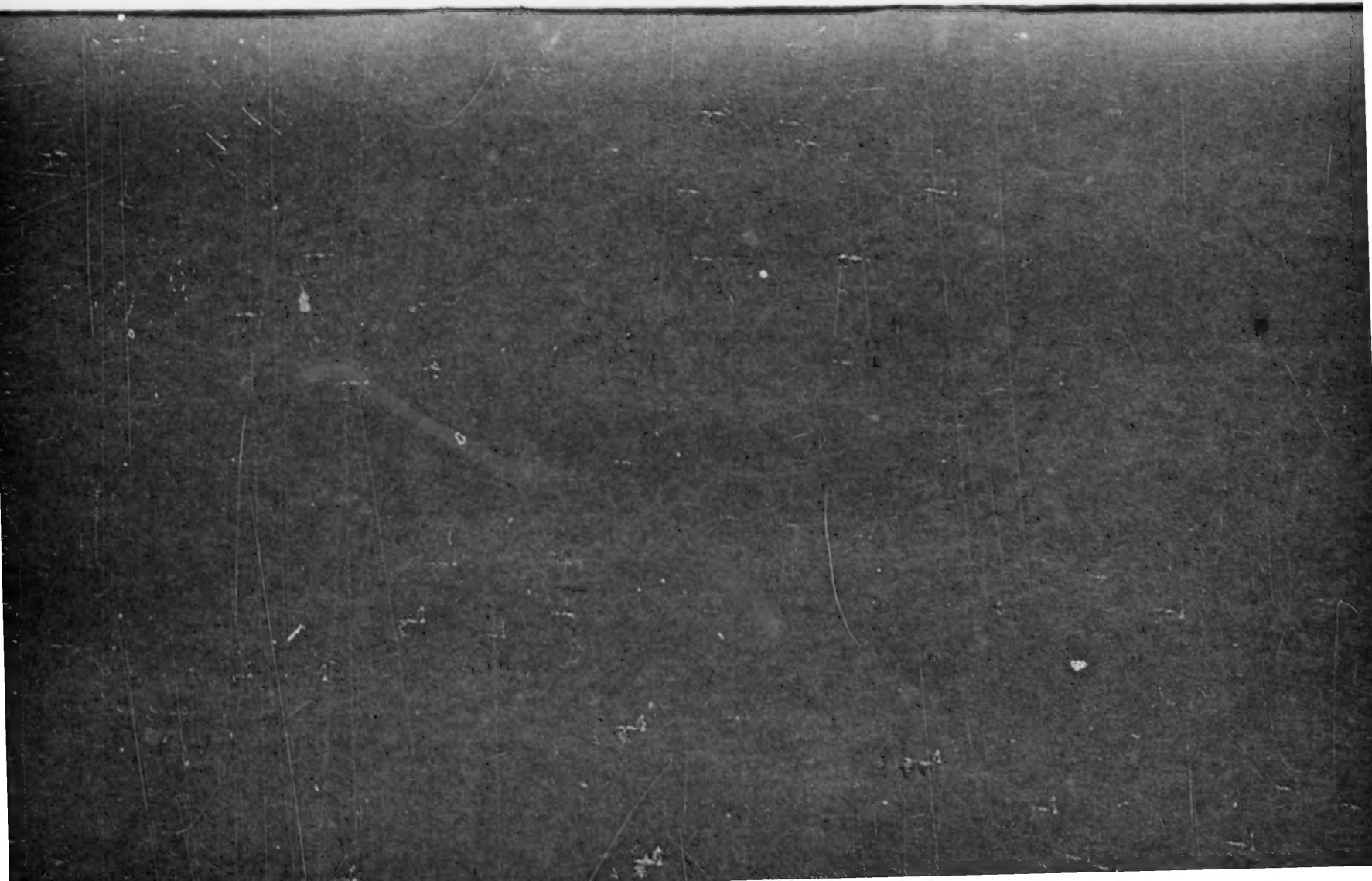
Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent would respectfully submit that neither the decision below nor the facts contained in the record, raise the questions presented in the Petitioner's brief. Therefore, Respondent respectfully restates the questions presented that relate to this Court's discretionary jurisdiction to issue a Writ of Certiorari:

I.

WHETHER THE 11TH CIRCUIT COURT OF APPEALS CORRECTLY CONCLUDED THAT THE TRIAL COURT ERRED AS A MATTER OF LAW IN NOT DIRECTING A VERDICT ON THE DEFENSE OF WILFUL MISCONDUCT, AND, WHETHER THE DECISION OF THE 11TH CIRCUIT COURT OF APPEALS CONFLICTS WITH A DECISION OF ANOTHER U.S. CIRCUIT COURT OF APPEALS OR A DECISION OF THIS COURT. (PETITIONER SUBMITS THIS QUESTION ADDRESSES POINTS I & II RAISED BY PETITIONER).

II.

WHETHER PUNITIVE DAMAGES ARE RECOVERABLE WHERE A SHIPOWNER'S FAILURE TO PROVIDE MAINTENANCE AND CURE IS ARBITRARY AND WILFUL SO AS TO SUPPORT AN AWARD OF ATTORNEY'S FEES PURSUANT TO THIS COURT'S DECISION IN *VAUGHAN V. ATKINSON.*

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STATEMENT OF THE CASE

Respondent would submit that the appellate opinion in the instant case sets forth the material factual matters necessary for consideration by the Court whether to issue a Writ of Certiorari in this matter.

Respondent would emphasize the appellate court below concluded that there was insufficient evidence, as a matter of law, to support a finding of wilful misconduct sufficient to deny Respondent his right to maintenance and cure (App. 12). (Reference is made to the Appendix to the Brief of Petitioner).

The evidence below was that crewmembers were allowed to drink onboard the vessel, even to the point of drunkenness. There was no evidence that Respondent engaged in any sort of activity that was sanctioned by the Petitioner, or expressly prohibited. To the contrary, the testimony below was that Respondent had merely engaged in the sort of activity that most of the crewmembers onboard Petitioner's vessels engaged in. He merely engaged in the typical activities of a seaman.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW CORRECTLY APPLIES THE LAW OF MAINTENANCE AND CURE, AND DOES NOT CONFLICT WITH ANY DECISION OF ANOTHER U.S. CIRCUIT COURT OF APPEALS, OR A DECISION OF THIS COURT.

The opinion below, and the testimony presented at trial, simply do not support the Petitioner's contention

that the 11th Circuit Court of Appeals has created a new exception to the defense of wilful misconduct in maintenance and cure actions. The 11th Circuit Court of Appeals correctly applied the principles of law applicable to maintenance and cure actions, and the decision in no way conflicts with any other decision of another U.S. Circuit Court of Appeals, or of a decision of this Court.

The decision below recognizes that wilful misconduct is a defense to a claim for maintenance and cure. The Court below relied on this Court's opinions in *Warren v. U.S.*, 340 U.S. 523, 71 S.Ct. 432, 95 L.Ed. 503 (1951), *Farrell v. U.S.*, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850 (1949) and *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 63 S.Ct. 930, 87 L.Ed. 1107 (1947).

As stated in the decision below, *Warren* requires " . . . positively vicious conduct – such as gross negligence or wilful disobedience of orders", before finding that a seaman will forfeit his right to maintenance and cure.

The paternalistic duty of a shipowner towards a crewmember was recognized by this Court in *Farrell.*

In *Aguilar,* this Court recognized that intoxication may constitute the type of conduct that would be sufficient to deny a seaman his right to maintenance and cure. However, in *Aguilar* it was recognized that intoxication may in fact constitute a classic predisposition of sailors, and that intoxication alone would not automatically forfeit a seaman's right to maintenance and cure. This Court cited to *The Quaker v. City* decision, 1 F. Supp. 840, (E.D. Penn. 1931), which held that the mere fact a seaman was

injured as a result of being intoxicated was not an automatic forfeiture of his right to maintenance and cure.

The decision below clearly re-emphasizes that intoxication may, under certain circumstances, constitute wilful misconduct sufficient to deny a seaman his right to maintenance and cure. The decision below merely held that under the facts presented in the instant case, the evidence was insufficient as a matter of law to support a finding that Respondent had engaged in conduct "positively vicious", or conduct that constituted "gross negligence or wilful disobedience of orders", sufficient to deny the Respondent his right to maintenance and cure.

Accordingly, Respondent would respectfully submit that there is no reason for this Court to grant a Writ of Certiorari. The decision below merely re-affirmed established principles of law in maintenance and cure actions, and was resolved based on the testimony presented in the instant case. The decision below does not create any new exception in the law of maintenance and cure, nor does it conflict with any decision of another U.S. Circuit Court of Appeals or a decision of this Court.

II.

THE DECISION BELOW DOES NOT INVOLVE A CASE WHERE PUNITIVE DAMAGES WERE AWARDED BUT MERELY REMANDS TO THE TRIAL COURT FOR A DETERMINATION OF WHETHER PUNITIVE DAMAGES SHOULD BE AWARDED UPON A VERY SPECIFIC FACTUAL FINDING BY THE TRIER OF FACT THAT THE FAILURE TO PROVIDE MAINTENANCE AND CURE WAS SO WILFUL AND ARBITRARY AS TO JUSTIFY PUNITIVE DAMAGES.

Petitioner inaccurately states that the decision below raises the question whether punitive damages are

recoverable for "any type" of failure by a shipowner to provide maintenance and cure.

The decision below merely reaffirms precedent in the 11th Circuit, see *Hines v. L.A. LaPorte*, 820 F. 2d 1187 (11th Cir. 1987), as well as precedent in the 1st Circuit, see *Robinson v. Pocahuntas, Inc.*, 477 F. 2d 1048 (1st Cir. 1973), and the 5th Circuit, see *Breece v. AWI, Inc.*, 823 F. 2d 100 (5th Cir. 1987).

It is true that the 2nd Circuit Court of Appeals has held that only attorney's fees are recoverable upon a finding of wilful and arbitrary failure to provide maintenance and cure, and that a seaman is not entitled to punitive damages in addition to an award of attorney's fees, and 5th Circuit, see *Kraljic v. Berman Enterprises, Inc.*, 575 F. 2d 412 (2d Cir. 1978). Therefore, there is a conflict with the 2nd Circuit Court of Appeals to the extent that the decision below holds that a seaman is entitled to both attorney's fees and punitive damages.

However, the decision below did not impose punitive damages upon the Petitioner; the decision below merely remands to the trier of fact to determine whether punitive damages are in fact justified under the facts and circumstances of this case. Until punitive damages are in fact imposed, Respondent would submit that the Court need not address the issue since the issue may become moot in the instant case if in fact punitive damages are not awarded.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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